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KSK Sawmill Sdn Bhd v FW Solutions Sdn Bhd

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(NCVC)(W)-260–02 OF 2018
AHMADI ASNAWI, ABDUL KARIM AND LEE SWEE SENG JJCA
3 FEBRUARY 2020

C *Contract — Breach — Variation of contract — Oral variation — Appellant brought action against respondent for breach of mining rights agreement — Respondent submitted 'no case to answer' — Learned judge disregarded appellant's evidence with respect to oral variation of terms of written agreement — Written agreement provided in-built mechanism for future agreement — Delay in obtaining mining certificate by appellant contrary to written agreement but respondent did not object — Effect of acceptance of performance at time other than that agreed upon — Whether time was no longer an essence — Whether respondent had waived its right to terminate contract — Whether learned trial judge ought to have accepted appellant's evidence with respect to oral variation of terms of written agreement when respondent submitted 'no case to answer' — Contracts Act 1950 s 56(3)*

D

E

F *Evidence — Failure to adequately put case or challenge evidence — Consequences — Respondent submitted 'no case to answer' against appellant's case — Respondent failed to adduce evidence to challenge appellant's case — Whether trial judge ought to have accepted evidence of appellant, being not inherently incredible, in the face of respondent's submission of 'no case to answer'*

G

Evidence — Oral agreement — Whether oral assurance admissible to vary or add to terms of written contract — Whether agreement required by law to be in writing — Evidence Act 1950 s 92(d)

H The appellant and respondent had entered into a mining rights agreement ('the MRA') whereby under the said agreement, the appellant was responsible to obtain the relevant mining certificate for 300 acres of project area situated in two plots of land whereas the respondent was responsible to conduct mining work on the project area. Problem arose when the respondent failed to

I commence mining work on the said project area. The appellant had brought an action against the respondent for breach of the MRA and in response, the respondent had submitted a no case to answer. The learned High Court judge had dismissed the appellant's claim, hence the present appeal. In dismissing the appellant's claim, the learned judge had disregarded the appellant's evidence

with respect to an oral variation of the terms of the MRA. The argument by the respondent was that the mining certificate under the MRA had been obtained by the appellant outside the agreed period of three months plus one-month extension. The appellant submitted that time was no longer of the essence when the respondent upon being given a copy of the mining certificate did not exercise its right to terminate the MRA. The issues arose were: (a) whether the appellant may be allowed to adduce oral evidence under the proviso in s 92(d) of the Evidence Act 1950; (b) whether the trial judge ought to have accepted the evidence of the appellant, being not inherently incredible, in the face of the respondent's submission of 'no case to answer'; (c) whether the respondent, by not exercising its right to terminate the MRA for late issuance of the mining certificate, had in reality waived its right to do so and accepted the appellant's performance of the MRA; and (d) whether the appellant had complied with the MRA by applying for one mining certificate covering the whole of the 300 acres as the project area under one title.

Held, allowing the appeal, setting aside the decision of the High Court and remitting back the case to High Court for assessment of damages by registrar with costs of RM10,000 to the appellant subject to payment of allocator:

(1) The MRA itself provided an in-built mechanism for a future agreement by both the parties on the project area which had been identified by and submitted by the appellant for approval of the authorities for the mining license, as such, the learned trial judge erred in deciding that no oral evidence could be allowed to vary the written terms of the MRA. In addition, the nature of the MRA with respect to mining rights and profit sharing did not fall into the category of contract which was by law required to be in writing and as such there was nothing wrong for a party to the contract to adduce evidence of 'the existence of any distinct subsequent oral agreement to modify the terms of the contract' (see paras 14, 16 & 19).

(2) The explanations given by the appellant in PW2, its managing director, were not inherently incredible or inherently improbable. It was more likely than not that time was no longer of the essence when the respondent upon being given a copy of the mining certificate did not exercise its right to terminate the MRA for the relevant approval was obtained out of time by some four months. Not only should the learned trial judge have accepted the evidence of the appellant's witnesses that did not appear to be inherently incredible, there were sufficient authorities to say that the learned trial judge should have drawn an adverse inference against the respondent for failure to offer any evidence to rebut the appellant's evidence when the respondent was in a position to do so but had chosen consciously not to do so (see paras 31 & 38).

(3) The evidence of the appellant through PW2 ought to have been accepted by the trial judge as having not been rebutted and that he had explained that the respondent by conduct had accepted the issuance of the mining certificate for 300 acres of land as contractually agreed. It could be inferred from the evidence adduced by the appellant that the respondent had waived its right to terminate the MRA for the issuance of the mining certificate some four months after the cut-off date. Further, having elected by its conduct and action to affirm the contract, the respondent could not now resile from that position to the detriment of the appellant. The respondent would be estopped from contending that the appellant had breached cl 2 of the MRA when the appellant had been led to believe by the respondent's conduct that the respondent had accepted the mining certificate issued late (see paras 73–74 & 77–78).

(4) It was the area of about 300 acres that both parties had agreed upon when the MRA was executed without any agreement at that stage to the exact demarcation of the area as to whether it would fall on just the bigger piece of the two pieces of the land or that it would fall on partly the smaller piece and partly the bigger piece with both combining to form about 300 acres. Further, the evidence of PW2, not rebutted by the respondent, was that the respondent had demarcated the project area to be the 300 acres in the bigger lot (see paras 94 & 100).

(5) Section 56(3) of the Contracts Act 1950 was relevant in the present case. If the respondent's stand was that though some three years had passed, it nevertheless had not accepted the fact that the mining license was not for both pieces of the land, then surely it must give evidence as to what it had been doing for the three years that had passed. This it can only do by giving sworn evidence from the witness box and be subject to cross-examination by the appellant's counsel. Absent that, there would be no evidence on non-acceptance of the mining license obtained (see paras 110–111).

[Bahasa Malaysia summary

Perayu dan responden telah memasuki perjanjian hak perlombongan ('PHP') di mana di bawah perjanjian tersebut, perayu bertanggungjawab untuk mendapatkan sijil perlombongan yang berkaitan untuk kawasan projek seluas 300 ekar yang terletak di dua bidang tanah manakala responden bertanggungjawab untuk menjalankan kerja-kerja perlombongan di kawasan projek. Masalah timbul apabila responden gagal memulakan kerja perlombongan di kawasan projek tersebut. Perayu telah memulakan tindakan terhadap responden kerana melanggar PHP dan sebagai tindak balas, responden telah mengemukakan tiada kes untuk dijawab. Hakim Mahkamah Tinggi yang bijaksana telah menolak tuntutan perayu, oleh itu rayuan semasa. Dalam menolak tuntutan perayu, hakim yang bijaksana telah mengabaikan keterangan perayu berkenaan dengan variasi lisan terma PHP. Hujah oleh

responden adalah bahawa sijil perlombongan di bawah PHP telah diperoleh oleh perayu di luar tempoh yang dipersetujui iaitu tiga bulan ditambah dengan tempoh lanjutan satu bulan. Perayu menghujahkan bahawa masa tidak lagi menjadi intipati apabila responden setelah diberikan salinan sijil perlombongan tidak melaksanakan haknya untuk menamatkan PHP. Isu-isu yang timbul adalah: (a) sama ada perayu boleh dibenarkan untuk memberikan keterangan lisan di bawah proviso dalam s 92(d) Akta Keterangan 1950; (b) sama ada hakim bicara sepatutnya menerima keterangan perayu yang tidak 'inherently incredible' apabila responden mengemukakan tiada kes untuk dijawab; (c) sama ada responden, dengan tidak melaksanakan hak untuk menamatkan PHP apabila sijil perlombongan dikeluarkan lewat, sebenarnya telah mengenepikan hak untuk berbuat demikian dan menerima pelaksanaan PHP oleh perayu; dan (d) sama ada perayu telah mematuhi PHP dengan memohon sijil perlombongan meliputi keseluruhan 300 ekar sebagai kawasan projek di bawah satu geran tanah.

Diputuskan, membenarkan rayuan, mengenepikan keputusan Mahkamah Tinggi dan meremitkan kes ke Mahkamah Tinggi untuk penilaian pampasan oleh pendaftar dengan kos RM10,000 diberikan kepada perayu tertakluk kepada bayaran alokator:

(1) PHP itu sendiri menyediakan mekanisma untuk perjanjian masa depan oleh kedua belah pihak di kawasan projek yang telah dikenalpasti dan diserahkan oleh perayu untuk kelulusan pihak berkuasa untuk lesen perlombongan, oleh itu, hakim bicara yang bijaksana terkhilaf dalam memutuskan tidak ada keterangan lisan yang boleh mengubah terma bertulis di dalam PHP. Di samping itu, sifat PHP berkenaan dengan hak perlombongan dan perkongsian keuntungan tidak termasuk dalam kategori kontrak yang dikehendaki oleh undang-undang untuk dibuat secara bertulis dan oleh itu tidak menjadi kesalahan bagi pihak kepada kontrak untuk memasukkan keterangan 'kewujudan apa-apa perjanjian lisan berikutnya yang berbeza untuk mengubahsuai terma kontrak' (lihat perenggan 14, 16 & 19).

(2) Penjelasan yang diberikan oleh perayu melalui PW2, pengarah urusannya, tidak 'inherently incredible' atau 'inherently improbable'. Ia lebih cenderung daripada tidak bahawa masa tidak lagi menjadi intipati apabila responden apabila diberi salinan sijil perlombongan tidak melaksanakan hak untuk menamatkan PHP sedangkan kelulusan yang berkaitan telah diperolehi empat bulan lambat dari tempoh yang sepatutnya. Bukan sahaja hakim bicara yang bijaksana patut menerima keterangan saksi-saksi perayu yang tidak kelihatan 'inherently incredible', terdapat rujukan undang-undang yang mencukupi untuk mengatakan bahawa hakim bicara yang bijaksana seharusnya membuat buruk terhadap responden atas kegagalan untuk menawarkan apa-apa keterangan untuk membantah keterangan perayu sedangkan responden

berada dalam kedudukan untuk berbuat demikian tetapi telah dengan rela memilih untuk tidak berbuat demikian (lihat perenggan 31 & 38).

(3) Keterangan perayu melalui PW2 sepatutnya diterima oleh hakim bicara sebagai tidak dibantah dan bahawa dia telah menjelaskan bahawa responden melalui tingkahlakunya telah menerima pengeluaran sijil perlombongan untuk 300 ekar tanah sebagaimana yang dipersetujui di dalam kontrak. Ia boleh disimpulkan dari keterangan yang dikemukakan oleh perayu bahawa responden telah mengecualikan haknya untuk menamatkan PHP apabila sijil perlombaan dikeluarkan kira-kira empat bulan selepas tarikh yang sepatutnya. Selanjutnya, setelah memilih melalui kelakuan dan tindakannya untuk mengesahkan kontrak, responden tidak boleh mengabaikan kedudukan tersebut untuk merugikan perayu. Responden dihalang untuk berhujah bahawa perayu telah melanggar klausa 2 PHP apabila perayu telah dipengaruhi untuk mempercayai melalui tingkah laku responden bahawa responden telah menerima sijil perlombongan yang dikeluarkan lewat (lihat perenggan 73–74 & 77–78).

(4) Ia adalah kawasan sekitar 300 ekar yang kedua-dua belah pihak telah bersetuju apabila PHP ditandatangani tanpa sebarang persetujuan pada tahap itu mengenai penentuan kawasan yang tepat sama ada ia akan dilakukan pada tanah yang besar daripada kedua-dua tanah tersebut atau ia akan dilakukan pada sebahagian tanah yang kecil dan sebahagian tanah besar dengan kedua-duanya digabungkan untuk membentuk kira-kira 300 ekar. Selanjutnya, keterangan PW2, yang tidak disangkal oleh responden, adalah bahawa responden telah menentukan kawasan projek adalah 300 ekar di kawasan tanah yang lebih besar (lihat perenggan 94 & 100).

(5) Seksyen 56(3) Akta Kontrak 1950 adalah relevan dalam kes semasa. Sekiranya tanggapan responden adalah bahawa walaupun tiga tahun telah berlalu, namun ia tidak menerima hakikat bahawa lesen perlombongan tersebut bukan untuk kedua-dua bahagian tanah tersebut, maka pastinya ia mesti memberi keterangan mengenai apa yang telah dilakukannya selama tiga tahun yang telah berlalu. Ini hanya boleh dilakukan dengan memberi keterangan bersumpah dari kandang saksi dan tertakluk kepada pemeriksaan balas oleh peguam perayu. Tanpa keterangan bersumpah tersebut, tidak ada bukti bahawa responden tidak menerima lesen perlombongan yang diperolehi (lihat perenggan 110–111).]

Cases referred to

Araprop Development Sdn Bhd v Leong Chee Kong & Anor [2008] 1 MLJ 783; [2008] 1 CLJ 135, CA (refd)

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd

[1995] 3 MLJ 331; [1995] 4 CLJ 283, FC (refd)
Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2015] 2 MLJ 441; [2015] 2 CLJ 453, FC (refd)
Kerajaan Negeri Kelantan Darul Naim v Syarikat Kemajuan Timbermine Sdn Bhd & Another [2013] 1 CLJ 537, CA (refd)
Mohd Nor Afandi bin Mohamed Junus v Rahman Shah Alang Ibrahim & Anor [2008] 3 MLJ 81, CA (refd)
Paul Murugesu s/o Ponnusamy (as representative of Nalamah d/o Sangapillay (deceased)) v Cheok Toh Gong & Ors [1996] 1 MLJ 843, SC (refd)
Takako Sakao (f) v Ng Pek Yuen (f) & Anor [2009] 6 MLJ 751, FC (refd)
Tetuan Theselim Mohd Sahal & Co & Ors v Tan Boon Huat & Anor [2017] 4 MLJ 207, CA (refd)
WJ Alan & Co Ltd v El Nasr Export & Import Co [1972] 2 QB 189, CA (refd)

Legislation referred to

Evidence Act 1950 ss 91, 92, 92(d), 115
Contracts Act 1950 s 56(1), (3)

Appeal from: Civil Suit No BA-22NCVC-185–03 of 2017 (High Court, Shah Alam)

Lua Kok Hiyong (Lua & Mansor) for the appellant.
Vinod Kuppusamy (Zainal & Assoc) for the respondent.

Lee Swee Seng JCA (delivering judgment of the court):

[1] This appeal raises the question as to whether the learned trial judge in the High Court at first instance ought to have disregarded the plaintiff's evidence with respect to an oral variation of the terms of a written agreement when the defendant submitted a 'no case to answer' and the trial judge had dismissed the plaintiff's claim altogether.

[2] As gathered from the notes of evidence the learned High Court judge appeared to have founded her decision on the fact that the mining certificate under a mining rights agreement ('MRA') had been obtained outside the agreed period of three months plus one month extension and as such the defendant was released from its obligation to commence mining on the lands in question and thus was not in breach of the MRA and was further entitled to terminate it.

[3] The problem is that no written grounds of decision was given as the learned High Court judge had since retired but her decision is captured in a cryptic note in the notes of proceedings as that of Her Ladyship having agreed with the defendant's submission that there was no case to answer and that the

plaintiff's claim was dismissed with costs.

[4] Aggrieved by the decision of the High Court, the plaintiff had appealed to this court on the following grounds:

(a) that the defendant had waived its right to terminate the MRA for late issuance of the mining certificate obtained some four months after the extended period when the defendant did not object to nor reject the same nor claim back the advance payment of RM1.5m for some three years thereafter and that the defendant had by its conduct affirmed the performance of the plaintiff in obtaining the mining certificate out of time;

(b) that by recital 2 of the MRA, the parties had built into the MRA a subsequent agreement on where the designated minimum of 300 acres should be for the purpose of the mining for submission to the authorities;

(c) that the parties had designated and demarcated the area for exploitation of mining to be the 300 acres of the bigger plot of land measuring 512 acres rather than on both pieces of land belonging to the plaintiff with the smaller piece measuring 107 acres;

(d) that the parties by their conduct had agreed that since the mining certificate had been obtained for at least 300 acres all on the bigger plot of land, there was no necessity to proceed with application for another mining certificate for the smaller plot of land and in any event the defendant did not prepare the application for execution by the plaintiff for submission for the mining certificate for the smaller plot of land; and

(e) that in any event the plaintiff's evidence of the above is not inherently incredible such that in the absence of any evidence from the defendant, the defendant having submitted a 'no case to answer' the learned High Court trial judge ought to have accepted the evidence of the plaintiff and allowed its claim.

WHETHER THE PLAINTIFF MAY BE ALLOWED TO ADDUCE ORAL EVIDENCE UNDER THE PROVISO IN S 92(d) OF THE EVIDENCE ACT 1950, BEING AN EXCEPTION TO THE EXCLUSION OF PAROL EVIDENCE RULE IN SS 91 AND 92 OF THE EVIDENCE ACT 1950

[5] The learned High Court judge appeared to have taken the view, from what is apparent from the comments made during the trial, as reflected in the notes of proceedings, that she would not allow any oral terms to be adduced to vary the written terms of the contract. At p 101 line 21 of the notes of proceedings when learned counsel for the plaintiff was submitting that there was an oral agreement to vary the written agreement Her Ladyship quipped as follows at lines 18–24:

LKH: I'm submitting that there are agreement, oral agreement to vary but I have to rely on the Mining Right Agreement.

YA: The Mining Rights Agreement is the written Agreement. You are saying that the written agreement, there is an oral variation under the written agreement. Tak boleh lah, Mr. Lua, What are you talking about?

NB: LKH — Lua Kok Hiyong, learned counsel for the plaintiff.

YA — learned trial Judge.

[6] The learned judge had overlooked the fact that under the contract in the MRA dated 25 June 2012 (*RR Jld* II pp 157–163), by recital 2 thereof, the project area of about 300 acres had not been agreed upon yet when the MRA was executed and hence the language and tense used is that of the future as highlighted below:

> ... The said Project Area shall be about 300 acres in area which *[sic] to be identified and agreed by both parties* and may be enlarged in future, subject to mutual agreement ... (Emphasis added.)

[7] Consistent with the above agreement of the 'Project Area' to be agreed by both parties, the parties had provided in the Schedule to the MRA by para 4 thereof as follows:

4. Project Area : To be agreed by both Parties.

[8] What had been provided in writing when the parties signed the MRA as a matter to be decided in the future must surely be given effect to. It was a matter that the parties were comfortable to leave it to the good sense of the defendant to identify the 'Project Area' in the 'Land' consisting of two pieces of land belonging to the plaintiff as set out in para 3 of the Schedule.

[9] The two pieces of land listed in para 3 of the Schedule are held under HS (D) 473, PT 2494, Mukim of Belimbing, District of Jajahan Jeli, State of Kelantan measuring about 107 acres and HS (D) 6/97, PT No 2495, Mukim of Belimbing, District of Jajahan Jeli, State of Kelantan measuring about 512.5 acres.

[10] It does not in any way derogate from what the parties had agreed in writing which is to decide on the 'Project Area' of 'about 300 acres to be identified and agreed by both parties'.

[11] This is a case where the size of the area for the exploitation through mining is far more important than whether the 300 acres should consist of one

piece of land as in the bigger piece or should it be constituted in partly the bigger piece and partly the smaller piece with both adding up to about 300 acres.

[12] As testified by PW2, Mr Liew Ee Heong, the managing director of the plaintiff, the defendant prepared for submission for a mining certificate the information, details and survey on just one piece of the land ie the bigger piece held under PT No 2495.

[13] There was no requirement in the MRA that two mining certificates shall be obtained; one for PT No 2494 (the smaller piece) and another for PT No 95.

[14] The learned trial judge should not have rejected outright, as she appeared to have done so from the comments she made during the trial, that no oral evidence could be allowed to vary the written terms of the MRA when the MRA itself provided an in-built mechanism for a future agreement by both the parties on the 'Project Area' which had been identified by and submitted by the plaintiff for approval of the authorities for the mining license. The mining certificate was subsequently approved by the authorities albeit some four months after the submission but both parties were prepared to wait and indeed after its issuance, the defendant, though having the option to terminate the MRA, did not do so.

[15] To be exact the three months from the date of the MRA of 25 June 2012 would be 24 September 2012 and with the one month extension 'the cut-off date' would be 24 October 2012. The mining certificate for PT 2495 was only issued on 27 February 2013 some four months after the cut off date. See *RR Jld* II pp 164–169.

[16] As the MRA itself in recital 2 as well as para 4 of the Schedule provides for the parties to on a later date agree on the project area, there is already an in-built mechanism for the determination under the MRA by mutual consent where the project area is concerned.

[17] Under s 92(d) proviso of the Evidence Act 1950, evidence may be led where:

> (d) the *existence of any distinct subsequent oral agreement*, to rescind or *modify any such contract*, grant or disposition of property, may be proved except in cases in which the contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents; (Emphasis added.)

[18] The Supreme Court in *Paul Murugesu s/o Ponnusamy (as representative of Nalamah d/o Sangapillay (deceased)) v Cheok Toh Gong & Ors* [1996] 1 MLJ 843 at p 845 observed as follows with respect to a variation of a sale and purchase agreement: A

> In the first place, both parties to an agreement are *entitled to vary any term of the agreement in writing, or orally, where oral evidence of such variation can of course be given, to quote s 92(d) of the Evidence Act 1950*, 'save in cases in which the contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to registration of documents'. The above agreement is not of those excepted cases. (Emphasis added.) B C

[19] Here the nature of the MRA with respect to mining rights and profit sharing does not fall into the category of contract which is by law required to be in writing and as such there is nothing wrong for a party to the contract to adduce evidence of 'the existence of any distinct subsequent oral agreement to modify the terms of the contract'. D

[20] Here the parties had contemplated and provided for this where the project area is concerned for at that point when the MRA was executed the defendant had not have the opportunity to do its land survey and soil test to determine where the concentration of the iron ore deposit would be found. They were however both agreed that the project area shall be about 300 acres. E

[21] If it is later determined and agreed that the total project area of 300 acres shall be in Lot PT 2495 which is more than 300 acres at 512.5 acres, then it does not make sense to apply for a mining certificate for both pieces of the land or for two mining certificate, one for each piece of the land. F

[22] One thing is clear, the learned High Court trial judge must allow evidence to be led as to what the subsequent agreement was with respect to the actual boundary of the project area as that has been provided for future agreement in the MRA. G

[23] Only then can the court determine whether there was an agreement achieved where the project area demarcation is concerned since under recital 1 it is 'to be identified and agreed by both parties and may be enlarged in the future, subject to mutual agreement'. H

[24] Was it a case where no agreement was achieved where the actual location of the project area of about 300 acres is concerned or is it a case where the demarcation had been agreed to be in the bigger lot and the plaintiff had proceeded to apply for the approval of the relevant authorities? I

[25] Without allowing for evidence to be adduced by the plaintiff it would not be possible to determine which of the above versions is correct.

[26] There appears to be a misdirection by the trial judge. What then should be the consequence to the plaintiff's case in the light of the defendant's submission of a 'no case to answer'?

WHETHER THE TRIAL JUDGE OUGHT TO HAVE ACCEPTED THE EVIDENCE OF THE PLAINTIFF, BEING NOT INHERENTLY INCREDIBLE, IN THE FACE OF THE DEFENDANT'S SUBMISSION OF 'NO CASE TO ANSWER'

[27] After the plaintiff two witnesses had given evidence, learned counsel for the defendant informed the trial judge that the defendant would not be calling any witnesses and that he is submitting a 'no case to answer' and closing his case.

[28] Learned counsel for the defendant further informed the court that the core issue was whether the MRA between the parties had been orally varied as alleged by the plaintiff.

[29] The variation as alleged would include the obtaining of the mining certificate some four months after the deadline and the issuance of the mining certificate for just the bigger piece of land and not for both pieces of the land albeit that the total project area is still 300 acres as stated in the MRA.

[30] The approach in assessing the evidence adduced by the plaintiff when the defendant submits a 'no case to answer' has been clearly set out in the Federal Court's case of *Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751 at p 759 as follows:

> [4] In our judgment, two consequences inevitably followed when the first respondent who was fully conversant with the facts studiously refrained from giving evidence. In the first place, the evidence given by the appellant ought to have been presumed to be true. As Elphinstone CJ said in *Wasakah Singh v Bachan Singh* (1931) 1 MC 125 at p 128:
>
> > If the party on whom the burden of proof lies gives or calls evidence which, if it is believed, is sufficient to prove his case, then the judge is bound to call upon the other party, and has no power to hold that the first party has failed to prove his case merely because the judge does not believe his evidence. At this stage, the truth or falsity of the evidence is immaterial. *For the purpose of testing whether there is a case to answer, all the evidence given must be presumed to be true.*
>
> Now, what the trial judge did in the present case is precisely what he ought not to have done. He expressed dissatisfaction with the appellant's evidence without asking himself that most vital question: does the first defendant/respondent have a case to

answer? This failure on the part of the trial judge is a serious non-direction amounting to a misdirection which occasioned a miscarriage of justice. The trial judge was at that stage not concerned with his belief of the appellant's evidence. *She had given her explanation as to the discrepancies in the figures. And her evidence does not appear to be either inherently incredible or inherently improbable. In these circumstances it was the duty of the judge to have accepted her evidence as true in the absence of any evidence from the first respondent going the other way*. He however failed to direct himself in this fashion thereby occasioning a serious miscarriage of justice. (Emphasis added.)

[31] The explanations given by the plaintiff in PW2, its managing director, are not inherently incredible or inherently improbable. It is more likely than not that time was no longer of the essence when the defendant upon being given a copy of the mining certificate did not exercise its right to terminate the MRA for the relevant approval was obtained out of time by some four months.

[32] The defendant was perfectly entitled not to terminate the contract and such a contract is only voidable at the option of the defendant under s 56(1) of the Contracts Act 1950. There was no termination of the contract after the expiry of the deadline on 24 October 2012 nor after the mining certificate for PT 2495 was issued on 27 February 2013.

[33] Instead the defendant had affirmed the contract by not asking for an immediate refund of the advance payment made of RM1.5m and more so when the balance RM500,000 was stipulated as payable only upon the issuance of the mining certificate.

[34] More than that PW2 had proceeded to provide the relevant infrastructure to facilitate the mining works as requested and required by the defendant.

[35] PW1 Sr Azian bin Abdul Aziz, a registered valuer from Rahim & Co, a firm of international property consultants, when giving evidence on his valuation as to what had been done on the land by the plaintiff alluded in his report dated 9 April 2014 at p 94 of *RR* that for Lot No PT 2495 has been developed with an open pit iron ore mine together with its improvements, three units of single-storey temporary workers quarters building and internal earth road, timber bridge and culvert bridge.

[36] It was not until 10 November 2016 that the defendant through its solicitors demanded for a refund of the advance payment made. Such a conduct smacks of an afterthought. At any rate the defendant must come and give evidence to rebut what the plaintiff had said under oath.

[37] The explanation given by the plaintiff as to why the defendant was content to apply for the mining certificate through the plaintiff as the owner of the bigger piece of land was that from the point of economy of scale and the risk of environmental pollution if it were to work on the smaller piece of land adjacent to the main road, makes a lot of sense having regard to the agreed scale of operation of 300 acres.

[38] Not only should the learned trial judge have accepted the evidence of the plaintiff's two witnesses that does not appear to be inherently incredible, there are sufficient authorities to say that the learned trial judge should have drawn an adverse inference against the defendant for failure to offer any evidence to rebut the plaintiff's evidence when the defendant was in a position to do so but had chosen consciously not to do so.

[39] At pp 759–760 of *Takako Sakao*'s case it was further expounded as follows:

> [5] The second consequence is that the court ought to have drawn an adverse inference against the first respondent on the amount of the appellant's contribution to the purchase price as well as the existence and the terms of the mutual understanding or agreement that she had with the first respondent. Where, as here, the first respondent being a party to the action provides no reasons as to why she did not care to give evidence the court will normally draw an adverse inference. See *Guthrie Sdn Bhd v Trans-Malaysian Leasing Corp Bhd* [1991] 1 MLJ 33. See also *Jaafar bin Shaari & Anor (suing as Administrators of the Estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor* [1997] 3 MLJ 693 where Peh Swee Chin FCJ said: '*The respondents had chosen to close the case at the end of the appellants' case. Although they were entitled to do so, they would be in peril of not having the evidence of their most important witness and of having an adverse inference drawn against them for failing to call such evidence should the circumstances demand it.*' There are two other authorities that are of assistance on the point. In *Wisniewski v Central Manchester Health Authority* [1998] PIQR 324, Brooke LJ when delivering the judgment of the Court of Appeal quoted from a number of authorities including the following passage from the speech of Lord Diplock in *Herrington v British Railways Board* [1972] AC 877:
>
> > The appellants, who are a public corporation, elected to call no witnesses, thus depriving the court of any positive evidence as to whether the condition of the fence and the adjacent terrain had been noticed by any particular servant of theirs or as to what he or any other of their servants either thought or did about it. This is a legitimate tactical move under our adversarial system of litigation. *But a defendant who adopts it cannot complain if the court draws from the facts which have been disclosed all reasonable inferences as to what are the facts which the defendant has chosen to withhold.* (Emphasis added.)

[40] The same approach had been followed in the Court of Appeal case of *Mohd Nor Afandi bin Mohamed Junus v Rahman Shah Alang Ibrahim & Anor*

[2008] 3 MLJ 81 at p 95 as follows:

> [32] So where did the sessions court go wrong? It must be understood that once a defendant elects not to call for evidence, apart from him being bound by that election, the effect is also that all the evidence led by the plaintiff must be assumed to be true. This proposition of law was succinctly said in *Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor* [1997] 3 MLJ 693 at p 712:
>
> > For, once a defendant in civil proceedings elects not to call evidence, then all the evidence led by the plaintiff must be assumed to be true.

[41] In the light of the above high authorities there is no cogent reason for the learned High Court trial judge not to have accepted the evidence of the plaintiff.

[42] Perhaps the learned trial judge was of the view that the plaintiff's evidence was so unsatisfactory as to amount to nothing of worth in proving its claim. The Court of Appeal in *Kerajaan Negeri Kelantan Darul Naim v Syarikat Kemajuan Timbermine Sdn Bhd & Another* [2013] 1 CLJ 537 did countenance that such an approach is permissible as follows:

> [12] Supreme Court's decision of *Jaafar Shaari & Siti Jama Hashim v Tan Lip Eng & Anor* [1997] 4 CLJ 509, the Court of Appeal in *Mohd Nor Afandi Mohamed Junus v Rahman Shah Alang Ibrahim & Anor* [2008] 2 CLJ 369, observed that:
>
> > It is trite that when a submission of no case is undertaken, it means that a defendant at the close of the plaintiffs case (in this case the appellant's) either had not made out a case in law, or the evidence was unsatisfactory or unreliable for the court to hold that the burden had been discharged. In *Storey v Storey* [1961] P 63, at p 5 the court opined in the following manner:
> >
> > > There are, however, two sets of circumstances under which a defendant may submit that he has no case to answer. In the one case there may be a submission that, accepting the plaintiffs evidence at its face value, no case has been established in law, and in the other that the evidence led for the plaintiff is so unsatisfactory or unreliable that the court should find that the burden of proof has not been discharged.

[43] Since no written or brief grounds of judgment was given, and giving the benefit of the doubt, we shall proceed further and evaluate the plaintiff's evidence and see if the plaintiff has nevertheless proved its case on the balance of probabilities.

WHETHER THE DEFENDANT, BY NOT EXERCISING ITS RIGHT TO TERMINATE THE MRA FOR LATE ISSUANCE OF THE MINING CERTIFICATE, HAD IN REALITY WAIVED ITS RIGHT TO DO SO AND ACCEPTED THE PLAINTIFF'S PERFORMANCE OF THE MRA

[44] The MRA does provide that should the plaintiff fail to obtain the mining certificate within the extended period of one month after the expiry of the three months from the date of the MRA called 'the Cut-Off Date', the defendant shall be entitled at its sole and absolute discretion, to terminate the MRA by giving written notice to such effect to the plaintiff, 'whereupon the First Party [plaintiff] shall immediately refund the Advance Payment free of interest to the Second Party [defendant] and thereafter neither parties shall have any claims against the other save for any antecedent breaches.'; see cl 2 of the MRA.

[45] Clause 8 further provides that time wherever stipulated 'shall be of essence of the Agreement'.

[46] There is thus a fixed time for the performance by the plaintiff of his part of the contract which is to obtain the mining license or certificate within the requisite 'Cut-Off Date'. What the parties had provided for is consistent with s 56(1) of the Contracts Act 1950 that reads as follows:

> 56 Effect of failure to perform at fixed time, in contract in which time is essential
>
> (1) When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, *becomes voidable at the option of the promisee*, if the intention of the parties was that time should be of the essence of the contract. (Emphasis added.)

[47] The fact as adduced by the plaintiff through its Managing Director PW2 is that the defendant did not, at the material time, serve any written notice on the plaintiff to terminate the MRA and neither did it raise the issue that the mining certificate obtained some four months after 'the Cut-Off Date', until some three years later.

[48] The second payment of RM500,000 was required to be paid only upon the issuance of the mining certificate and so if the mining certificate was not agreed by the defendant, the plaintiff had every right to expect the defendant to object and to say that the RM500,000 paid earlier together with the RM1m paid upon the execution of the MRA shall be refunded immediately.

[49] The need to reject the said mining certificate obtained outside the agreed time frame provided for is imperative as there is a next contractual obligation that would commence against the defendant.

[50] There is a further obligation on the defendant to work on the said project and if the defendant fails to do so for more than six months, the plaintiff shall be entitled to issue a show cause notice to the defendant and in the event that the defendant should fail to reply to the show cause notice within 30 days or the explanation in the show cause notice is not accepted by the plaintiff then the plaintiff is entitled to terminate the MRA immediately. See cl 12 of the MRA.

[51] The evidence that the defendant had failed to commence work on the project area for more than six months had not been rebutted by the defendant. Surely if the defendant's stand is that it would not commence work because of the late issuance of the mining certificate, then it must duly inform the plaintiff for otherwise the plaintiff would be losing out on the 50% profit that it should be receiving after having surrendered the portion of the project area to the defendant for it to commence mining.

[52] Under cl 9 of the MRA the defendant shall pay the plaintiff a sum equivalent to 50% of the net profits earned by the defendant from the said project for the minerals in the project area ('tributes').

[53] Looking at the scheme of the MRA, the plaintiff as the landowner shall contribute the land and the defendant as the mining contractor shall contribute the mining expertise. The defendant will carry out the mining work for a period of 30 years with the right to extend for another 20 years.

[54] The issue of profit sharing was specifically addressed in cl 5 of the MRA in that will be shared on a 50:50 basis provided the plaintiff obtains a mining certificate for 300 acres out of the 620 acres designated as the 'Project Area'. It further provides that the defendant agrees to provide the expertise to survey the suitable designated area for mining.

[55] As a sweetener for the plaintiff to sign the MRA and to show the sincerity on the part of the defendant, the defendant agreed to pay an advance payment of RM1.5m to the plaintiff under cl 1 which will be repaid back to the defendant by way of deduction of profits.

[56] Upon the issuance of the mining certificate the plaintiff commenced clearing and levelling the land, building structures and affixing some equipment on the land as shown in the valuation report at *RR Jld* II

pp 187–227. The defendant however failed to commence any mining activities on the 300 acres of the project area.

[57] If indeed the precondition of getting the mining certificate within the cut off date was so important then surely the defendant must have responded with all promptitude and diligence.

[58] It was some three years after the issuance of the mining certificate that the defendant made a demand on the plaintiff to refund the RM1.5m advanced under the MRA via its notice of demand sent though its solicitors Goh, Cheah & Chong dated 10 November 2016 alleging that the plaintiff had breached the MRA by failing to comply with cl 2 thereof in securing the relevant approvals from the authorities for the mining activities to be carried out.

[59] The plaintiff's solicitors Lua & Mansor responded with their show cause letter dated 8 February 2017 under cl 12 of the MRA for failing to work the agreed area for more than six months and as required, the defendant was supposed to respond within 30 days. There was another letter dated 8 March 2017 extending the time to reply to 15 March 2017 failing which the defendant would be deemed to refuse to show cause and have nothing to explain.

[60] The defendant's solicitors replied on 15 March 2017, reiterating that the relevant approvals of the authorities had not been obtained for both pieces of the land and that the parties had not moved further to agree and/or define the project area as per the MRA.

[61] Whether the plaintiff's version is more probable or the defendant's version is more probable, is a matter that the trial judge would have to decide after the defendant's witnesses have given evidence and subjected themselves to the plaintiff's cross-examination through its counsel.

[62] Here whilst the High Court had the benefit of the plaintiff's explanation which is not inherently incredible nor excessively fanciful, the defendant by submitting a 'no case to answer' had not rebutted the plaintiff's evidence at all.

[63] As explained by the plaintiff's witness in PW2, the defendant had not given the plaintiff the relevant area to demarcate for the application of the mining certificate other than for the 300 acres identified and demarcated in the bigger lot in PT 2495. If indeed that is not true then the defendant must produce evidence that the plaintiff had unreasonably refused to submit for the

mining certificate based on the defendant's proposal covering both pieces of land where supposedly more iron ore deposit are found.

[64] If the stand of the defendant is true that both parties had not moved beyond the execution of the MRA to agreeing on the demarcating of the project area, then the defendant should have rejected the mining certificate as not being in compliance with its proposed or intended project area which is partly on Lot PT 2494 or even the whole of it and the balance in Lot PT 2495.

[65] The defendant would need to explain this by taking the stand and giving his version under oath. This the defendant had consciously chosen not to do.

[66] The evidence of the plaintiff that has a ring of truth to it and which is certainly not inherently incredible, has not been rebutted by the defendant.

[67] Whilst the defendant has the right to terminate the MRA, it had not done so until an attempt some three years later by which time the plaintiff had expended much time and money to build the necessary infrastructure on the land. It is difficult to appreciate how a delay of some four months in obtaining the mining certificate can throw the defendant's projection of the profits off tangent as it would not need to pay the plaintiff anything in the tribute until the mining operations were generating revenue and profits.

[68] Granted if the defendant had wanted to terminate the MRA for failure to obtain the mining certificate on time it could have done so then, either when the deadline was up and soon after it had received a copy of the mining certificate and there would have been no question that could be raised.

[69] The defendant would be well within its contractual rights and the plaintiff would not be able to seriously or successfully object to the termination.

[70] The plaintiff would then have to refund the sum of RM1.5m being the advance payment and the MRA having been validly terminated, the plaintiff would be in a position to engage a different joint venture partner on terms to be agreed upon, seeing that the mining certificate is already issued in its name.

[71] Whatever it is the defendant must come to court and say under oath what had happened to justify that it had not waived its right to terminate even though some three years had passed and what are the other approvals to be obtained for which the defendant had done all there is at its end and the only

thing left is to wait for the authorities to approve but that the authorities had not approved for the defendant to commence operation.

[72] Pleadings and even the witness statement not given under oath and not executed by the defendant key witness are not evidence before the court and cannot be accepted as such.

[73] The evidence of the plaintiff through PW2 its Managing Director, ought to have been accepted by the trial judge as having not been rebutted and that he had explained that the defendant by conduct had accepted the issuance of the mining certificate for 300 acres as contractually agreed based on the area surveyed by the defendant and prepared by the defendant for the plaintiff's submission.

[74] In fact the necessary inference can be drawn from the evidence as adduced by the plaintiff and it is this: the defendant had waived its right to terminate the MRA for the issuance of the mining certificate some four months after the cut off date.

[75] From the facts adduced and not rebutted the plaintiff had made out a prima facie case. The defendant had elected to accept the performance of the plaintiff in obtaining the mining certificate albeit some four months late. Section 56(3) of the Contracts Act 1950 provides as follows:

> Effect of acceptance of performance at time other than that agreed upon
>
> (3) If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of the promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of the acceptance, he gives notice to the promisor of his intention to do so.

[76] The Court of Appeal in *Tetuan Theselim Mohd Sahal & Co & Ors v Tan Boon Huat & Anor* [2017] 4 MLJ 207 at pp 223–224 observed as follows with respect to a purchaser's conduct in affirming a sale and purchase agreement instead of terminating it as follows:

> [21] It seems to us that having elected to proceed with the SPA, the plaintiffs are estopped from alleging that the defendants were negligent for not complying with their instructions to terminate the SPA. It certainly appeared that only after a further extension of time was refused by the vendor that allegations of failure to put in the necessary terms and the failure to terminate the SPA were mounted against the defendants.
>
> [22] In our view the plaintiffs were approbating and reprobating in adopting such an approach. The law does not permit this. In *Verschures Creameries, Limited v Hull and Netherlands Steamship Company, Limited* [1921] 2 KB 608, Scrutton LJ

elucidated the principle as follows at p 612:

> The doctrine of election is not however confined to instruments. A person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that that it is valid, and then turn around and say it is void for the purposes of securing some other advantage. That is to approbate and reprobate the transaction.

[23] Now having decided to affirm the contract and taking steps to conclude the said contract by obtaining the necessary financing, the plaintiffs are deemed to have abandoned their right by making such an election. In this respect, the learned authors of *Chitty on Contracts* (Vol 1, 31st Ed) had this to say (at para 24-003):

> Where the innocent party, being entitled to choose whether to treat the contract as continuing or to accept the repudiation and treat himself as discharged, elects to treat the contract as continuing, he is usually said to have affirmed the contract. He will not be held to have elected to have affirmed the contract unless, first, he has knowledge of the facts giving rise to the breach, and, secondly, he has knowledge of his legal right to choose between the alternatives open to him. Affirmation may be express or implied. It will be implied if, with knowledge of the breach and of his right to choose, he does some unequivocal act from which it may be inferred that he intends to go on with the contract regardless of the breach or from which it may be inferred that he will not exercise his right to treat the contract as repudiated. Affirmation must be total: the innocent party cannot approbate and reprobate by affirming part of the contract and disaffirming the rest, for that would be to make a new contract.

[77] Having elected by its conduct and action to affirm the contract, the defendant cannot now resile from that position to the detriment of the plaintiff.

[78] Indeed the defendant would be estopped from contending that the plaintiff had breached cl 2 of the MRA when the plaintiff had been led to believe by the defendant's conduct that the defendant had accepted the mining certificate issued late and as it is on just the bigger piece of land encompassing the whole of the 300 acres of the designated and demarcated project area.

[79] If the defendant had informed the plaintiff soon after receiving the mining certificate the plaintiff could have taken steps to engage a new joint-venturer who would have the gumption to proceed rather than lying idle with no stream of income from the project area. That is not to mention the other costs incurred by the plaintiff in getting ready the necessary infrastructure to the land to facilitate the mining activities.

[80] The oft-quoted dicta of the Federal Court in *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331; [1995] 4 CLJ 283 (FC) would resonate with the facts of this case:

> The time has come for this Court to recognise that the doctrine of estoppel is a flexible principle by which justice is done according to the circumstances of the case. Estoppel is a doctrine of wide utility and could be resorted to in varying fact patterns to achieve justice. Indeed the circumstances in which the doctrine may operate are endless.

[81] In the case of *WJ Alan & Co Ltd v El Nasr Export & Import Co* [1972] 2 QB 189 it was said that 'If one party by his conduct, leads another to believe that the strict rights arising under the contract will not be insisted upon, intending that the other should act on that belief, and he does act on it, then the first party will not afterwards be allowed to insist on strict legal rights when it would be inequitable for him to do so'.

[82] In fact the doctrine of estoppel has long been codified in our statute book in s 115 of the Evidence Act 1950 as follows:

> 115 Estoppel
>
> When one person has by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, otherwise than but for that belief he would have acted, neither he nor his representative in interest shall be allowed in any suit or proceeding between himself and that person or his representative in interest to deny the truth of that thing.

[83] Learned counsel for the defendant submitted that silence on the part of the defendant does not mean that waiver and/or estoppel would operate against the defendant and cited in support the case of *Araprop Development Sdn Bhd v Leong Chee Kong & Anor* [2008] 1 MLJ 783; [2008] 1 CLJ 135. Whilst silence is not determinative it certainly is detrimental to the defendant when speech is expected! Whilst it may be difficult at times to interpret silence, it does not prevent the court from drawing the necessary inferences when speech is legitimately expected; more so when as here the defendant's conduct is consistent with its having accepted the performance by the plaintiff.

[84] Whether by waiver, election or estoppel the defendant would have to adduce evidence to shift the evidential burden of proof by rebutting it. This the defendant had made a conscious choice not to do so by submitting a 'no-case to answer' and so the consequences must follow.

WHETHER THE PLAINTIFF HAD COMPLIED WITH THE MRA BY APPLYING FOR ONE MINING CERTIFICATE COVERING THE WHOLE OF THE 300 ACRES AS THE PROJECT AREA UNDER ONE TITLE

[85] The evidence of the plaintiff through PW2 was that it was the defendant that demarcated and designated the 300 acres for the application of

the mining certificate; the plaintiff having no experience in this area and the defendant having the necessary experience and expertise where iron ore mining is concerned.

[86] According to PW2, after the execution of the MRA the defendant commenced soil testing and survey works and border markings work for the project area of 300 acres within Lot PT 2495 of 512.5 acres. PW2 further said under oath that it was the defendant itself that chose to work on the 300 acres in Lot PT 2495 for cost benefit of working on a single lot of 300 acres rather than on two separate and different lots of a combined 300 acres and furthermore the other Lot PT 2494 is near the main road and there would be the issue of environmental pollution to address and the difficulty of getting the support of the Department of Environment. Lot PT 2494 the smaller piece is also of a rather narrow strip. Both from the point of management as well as transport and production, the economy of scale for the same 300 acres would favour a focus on just the bigger piece of Lot PT 2495 of 512.5 acres.

[87] We must say that the explanation given makes sense and is certainly not inherently incredible.

[88] PW2 further testified that based on the technical assistance from the defendant and with the consent of the defendant to focus on the project area in Lot PT 2495 only, the plaintiff duly submitted the application for the requisite mining license and obtained in due course the mining certificate dated 27 February 2013 which is valid until 26 February 2018 for Lot PT 2495 of 512.5 acres and that a copy of it had been given to the defendant with no protest or objection from it.

[89] There was no objection, much less rejection from the defendant that the mining certificate was for only one piece of the land and not for both pieces of the land and even then, only after the cut off date, which is a breach of the MRA for which the defendant would want to exercise its right to terminate the MRA. Under cl 2 of the MRA the exercise of the right to terminate is by way of a written notice to the plaintiff. No such written notice was sent until some three years later.

[90] The silence from the defendant that had stretched for some three years thereafter would mean that the defendant had accepted wholly the mining certificate issued for otherwise the defendant would have demanded the refund of the RM1.5m being the advance payment made with the second payment of RM500,000 to be made only after the issuance of the mining certificate.

[91] The MRA does not state anywhere that there must be a mining license to be obtained for both lots in the land. It all depends on the project area which

A is agreed to be 'about 300 acres' with both the parties having the liberty to decide on where the 300 acres should be defined and demarcated as in 'to be identified and agreed by both parties'.

B **[92]** There is no good reason for the plaintiff not to accede to the request of the defendant where the decision to define and demarcate the project area is concerned for the defendant is the party endowed with the necessary experience and expertise where knowledge of ore productivity is concerned perhaps based on land survey and soil testing.

C **[93]** The plaintiff having no experience here would have no cause for complain as it relied on the wisdom and discernment of the defendant here who possessed the special knowledge and skill. It can only benefit both parties as the defendant would want to optimise the mining, excavation and extraction
D of the iron ore to the fullest and it can only be a win-win solution for both as the net proceeds after deduction of the costs of production is divided equally between the parties.

E **[94]** It is the area of about 300 acres that both parties had agreed upon when the MRA was executed without any agreement at that stage to the exact demarcation of the area as to whether it would fall on just the bigger piece of the two pieces of the land or that it would fall on partly the smaller piece and partly the bigger piece with both combining to form about 300 acres.

F **[95]** Parties were comfortable to leave the demarcation and with that the determination as to whether one or both pieces of the land would be involved and with that the application for one mining certificate or two depending on whether one or two pieces of the land are involved.

G **[96]** The rationale for this is obvious because it is the defendant that had superior and special knowledge where the Project Area should be and there is no good reason for the plaintiff to disagree. The plaintiff can trust the defendant who had to come up with the initial capital costs in the machinery,
H equipment and labour to be motivated by the maximisation of profits that would be shared equally after deduction of the costs of production.

[97] It is in this context that the expression is used in recital 3 that 'The
I Parties hereby have agreed with each other that it would be in their mutual benefit to amalgamate their respective interests ...'.

[98] The agreed 300 acres is not cast in concrete as it 'may be enlarged in future, subject to mutual agreement' as stated in recital 1.

[99] Clause 4 enjoins both the parties to mutually co-operate with each other and to ensure timely preparation and submission of the relevant applications to the relevant authorities with recital 1 having stated at the outset that the defendant as the second party referred to in the MRA shall contribute the technical expertise and the entire costs for carrying out the said project.

[100] The evidence of PW2, not rebutted by the defendant, is that the defendant had demarcated the project area to be the 300 acres in the bigger lot in Lot PT 2495.

[101] Whilst it is true that there is no time period given for the defendant to exercise its right to reject the mining certificate and to terminate the MRA on account of a failure to obtain the mining certificate for both pieces of the land, the defendant must decide to affirm the contract or avoid it within a reasonable time and more so when there is a continuing obligation of the defendant not to fail to work on the project for more than six months under cl 12 thereof.

[102] There is also the plaintiff's right given under cl 3 where it 'shall be allowed to deal with the said land (outside the said project area) with any third party'. In this context it was provided under cl 17 of the MRA that the plaintiff shall grant the defendant the first right of refusal in the event that the plaintiff intends to offer the balance of the said land to the public at a rate to be discussed between both parties.

[103] If indeed the defendant is trying to say, as may be surmised from the witness statement filed but not signed and with no oath taken and hence not evidence before the court, that it had identified a different project area for application of the mining license which encompasses both pieces of the land, then the relevant witness of the defendant must take his stand in the witness box to give sworn evidence to that effect.

[104] If it is indeed true that what was issued was not what was mutually agreed to be applied for, the defendant had its remedy in rejecting the mining certificate issued and terminate the MRA and get a full refund of the advance payment made and sued for antecedent breach in submitting to the relevant authorities not based on what had been mutually agreed upon.

[105] The plaintiff is then at liberty to engage a third party to undertake the mining works. The problem is the defendant had not adduced any evidence to show that its version of what happened is more probable in that the plaintiff had refused to submit for the relevant authorities' approval of the mining license based on the project area demarcated by the defendant.

[106] If the project area is so important as to be specifically marked out and

identified as falling on both pieces of the land, the defendant would have specially spelt it out in the MRA rather than leaving it for both parties to mutually agree on it in the future. What was clearly important to the parties was the area of the project area of about 300 acres and not the actual location of it other than that it would be in either the whole of the bigger piece or part on the bigger piece and part on the smaller piece.

[107] Either way no one is prejudiced as the defendant with the technical expertise and vast experience would be in a better position to decide and with the vested interest of recouping its initial survey and soil testing costs and the subsequent machinery, equipment and labour costs before the sharing of net profit equally between the parties.

[108] As we see it the exact location of the project area was never a point in issue but a matter which the defendant would be able to decide with greater precision based on the concentration of the iron ore after the initial survey and soil testing results were in.

[109] No doubt the initial legal burden is on the plaintiff to show that the defendant had breached the MRA and that had been discharged on the balance of probabilities in the evidence of the plaintiff, not rebutted by contrary evidence from the defendant, that the mining certificate had been obtained and that there had been no action on the part of the defendant in rejecting it as being not in compliance with cl 2 which the defendant read as the plaintiff's obligation to obtain the mining certificate for both pieces of the land, until some three years later.

[110] Again s 56(3) of the Contracts Act 1950 is relevant here. If the defendant's stand is that though some three years had passed, it nevertheless had not accepted the fact that the mining license was not for both pieces of the land, then surely it must give evidence as to what it had been doing for the three years that had passed. This it can only do by giving sworn evidence from the witness box and be subject to cross-examination by the plaintiff's counsel.

[111] Absent that there is no evidence on non-acceptance of the mining license obtained bearing in mind that the plaintiff would be at liberty to deal with the area outside the project area and would also be expecting the defendant to proceed with the mining works so that the profits would be shared equally soonest possible as the mining certificate has an expiry date in five years subject always to it being renewed successfully.

[112] The prejudice that the plaintiff continues to suffer is that it is not receiving its 50% share of the net profit from the mining that ought to have

been undertaken by the defendant in the project area for the three years since the issuance of the mining certificate and continuing until the trial of the matter.

[113] Both on grounds of waiver, election and estoppel, the defendant cannot now raise the issue of termination by way of notice dated 10 November 2016 on ground of breach of cl 2 of the MRA some three years and eight months after the issuance of the mining certificate dated 27 February 2013.

PRONOUNCEMENT

[114] Based on the evidence adduced and even in the absence of a written judgment from the trial judge, we are not hampered or handicapped in any way, as we can and have evaluated the evidence adduced and made the necessary inferences in this appeal, which after all, is by way of rehearing the case.

[115] Nothing turns on the credibility of witnesses of the plaintiff for the key evidence are all document-based and the documents do not lie.

[116] Having wrongly rejected the evidence of the plaintiff as being erroneously caught by s 92 of the Evidence Act 1950, the learned judge had dismissed the plaintiff's claim even in the absence of evidence from the defendant.

[117] With the greatest of respect, the High Court had arrived at a decision that is plainly wrong and cannot be supported by the evidence before the court and in law.

[118] We need to go no further than to cite the Federal Court's decision in the *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441; [2015] 2 CLJ 453 which reiterated the principle to be adopted by an appellate court when reversing findings of fact by a trial court:

> ... It is now established that the principle on which an appellate court could interfere with findings of fact by the trial court is 'the plainly wrong test' principle; see the Federal Court in *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309 (at p 10) per Steve Shim CJ (Sabah and Sarawak). More recently this principle of appellate intervention was affirmed by the Federal Court in *UEM Group Berhad v Genisys Integrated Pte Ltd* [2010] 9 CLJ 785 where it was held at p 800:
>
> > It is well-settled law that an appellate court will not generally speaking, intervene with the decision of a trial court unless the trial court is shown to be plainly wrong in arriving at its decision. A plainly wrong decision happens when the trial court is guilty of no or insufficient judicial appreciation of evidence (see *Chow*

A *Yee Way & Anor v Choo Ah Pat* [1978] 1 LNS 32; *Watt v Thomas* [1947] AC 484; and *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309.

B **[119]** We were thus constrained to allow the appeal and to set aside the decision of the High Court. We allowed the plaintiff's claim for damages for the defendant's breach of the MRA.

C **[120]** The case is remitted back to the Shah Alam High Court for assessment of damages by the registrar with costs of RM10,000 to the plaintiff/ appellant subject to payment of allocator.

D *Appeal allowed; decision of High Court set aside; case remitted back to High Court for assessment of damages by registrar with costs of RM10,000 to appellant subject to payment of allocator.*

Reported by Dzulqarnain Ab Fatar

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